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**IN THE
COURT OF APPEALS OF INDIANA**

BOBBY FRAME,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 71A03-0708-CV-398
)	
DIANA L. THARP and GREGORY EARLY,)	
)	
Appellees-Defendants.)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT 4
The Honorable William T. Means, Judge
Cause No. 71D04-9809-CP-1138

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Bobby Frame (Frame), appeals the trial court's judgment, which apportioned three percent liability for Frame's injuries to Appellees-Defendants, Diana Tharp (Tharp) and Greg Early (Early), and after a reduction for comparative fault.

We affirm.

ISSUE

Frame presents one issue for our review, which we restate as: Whether the trial court erred by permitting Tharp and Early to assert a nonparty defense alleging Michael Kaye Industries, Inc. (Michael Kaye Industries) is liable for Frame's injuries.

FACTS AND PROCEDURAL HISTORY

Tharp and Early purchased a parcel of land on March 4, 1997, and on March 12, 1997, they contracted with Lam-Cox Mobile Homes Sales (Lam-Cox) to purchase a modular home to place on the parcel. They decided to have the home set on a basement. After the home was set, it required carpeting, drywall finishing, painting, and trim work. Tharp and Early agreed to have these projects done, but did not know anyone capable of doing the trim work, so the Lam-Cox salesman offered to help them find someone to finish the trim work. The Lam-Cox salesman contacted Kevin Kinser (Kinser) who had experience in finishing other modular homes. The salesman obtained a quote from Kinser, which was approved by Tharp and Early.

In the modular home, an access hole was cut for the basement. The walls and door were framed around the access whole, which would eventually be the place where the basement stairs would be placed. Before the home was set upon the basement, a scrap piece

of decking was placed over the access hole. But, this decking was removed after the home was set to retrieve beams and jack stands located in the basement used to set the home on the foundation. Once the equipment was removed from the basement, the access hole was left open. This is standard procedure because replacing the decking would give the impression that the floor is solid, but it is not, because there is no center support and the decking is usually damaged when removed. (Transcript p. 204).

According to the contract, Lam-Cox was to set the home, but Lam-Cox subcontracted the work to Michael Kaye Industries because it did not have the staff to set the home. After the house was set, one of Michael Kaye Industries' employees told Tharp that the hole to the basement was open and to make sure that, if she had children, they stayed away from there. The workers from Michael Kaye Industries never told Tharp that she was supposed to warn other contractors coming into the house about the basement access hole.

Frame heard that Kinser had some work and contacted him about a job. Kinser hired Frame to perform work in Tharp and Early's home. Frame had never worked in a modular home before, and Kinser did not point out any potential hazards in the home when Frame showed up for work on Friday, June 13, 1997. There was no electricity in the home yet, and no lighting, other than the light from the windows. One of the jobs that Kinser instructed Frame to do was to install inside door facings. Before Frame started, he wanted to inspect how another door facing had been installed. He opened the door to the basement opening, believing it was a closet, and as he stepped through the doorway while inspecting the facing, he fell through the access hole into the basement, suffering injuries as a result.

On September 17, 1998, Frame filed a Complaint naming Kinser, Lam-Cox, Shrum's Homes Sweet Homes (Shrum's); and Mr. and Mrs. Greg Early¹ as defendants. Frame alleged that he fell into the home's basement and sustained injuries due to the negligence of the defendants. On January 18, 1999, Frame filed an Amended Complaint, adding Tharp as a defendant. On June 14, 1999, Tharp and Early filed their Answer to the Amended Complaint asserting, among other things, that Frame's alleged injuries were caused by the negligence of other defendants. In 2000, the parties became aware that Michael Kaye Industries had set the home. On August 18, 2000, Frame filed an Amended Complaint adding Michael Kaye Industries as a defendant pursuant to an agreement by the parties.

Lam-Cox was awarded summary judgment on March 14, 2001, and Shrum's was awarded summary judgment on February 15, 2002. Tharp and Early filed their Answers to Frame's Second Amended Complaint on August 6, 2004, alleging, in part, "any injury or damage claimed to have been sustained by Plaintiffs was the sole and proximate result of the negligence and carelessness of [] Michael Kaye Industries []." On November 18, 2004, Frame filed a Motion to Strike any affirmative defenses by Tharp and Early asserting that Kinser, Michael Kaye Industries, Lam-Cox, or Shrum's are responsible parties. On August 10, 2006, Frame filed a Motion for Summary Judgment, claiming that he was entitled to judgment on Tharp and Early's nonparty defense as to Michael Kaye Industries. On December 6, 2006, Frame filed a Motion to Dismiss his own claims against Kinser and Michael Kaye Industries. On January 10, 2007, Tharp and Early objected to the dismissal of

¹ There is no "Mrs. Greg Early."

Kinser and Michael Kaye Industries and asked that in the alternative they be named as nonparties and included on the verdict forms submitted to the jury.

The parties appeared for trial on January 16, 2007. That morning, the trial court held oral argument on Frame's Motion to Dismiss and the objection thereto. The trial court discharged the jury to further consider the issue of whether to dismiss Kinser and Michael Kaye Industries, and whether Tharp and Early should be able to assert a nonparty defense. The trial court rescheduled a jury trial for June 26, 2007. The trial court granted Frame's Motion to Dismiss Kinser and Michael Kaye Industries, but permitted them to be named as nonparties for comparative fault purposes. This action effectively denied Frame's Motion to Strike Tharp and Early's nonparty defense.

From June 26 through June 29, 2007, a jury trial was held. At the conclusion of the trial, the jury returned its verdict allocating fault as follows:

Percentage of fault attributable to Frame	7%
Percentage of fault attributable to Early	1%
Percentage of fault attributable to Tharp	2%
Percentage of fault attributable to Michael Kaye	40%
Percentage of fault attributable to Kinser	<u>50%</u>
= 100%	

(Appellant's App. p. 14). The jury also found Frame's total damages to be \$300,000. After reduction for comparative fault, the trial court entered a judgment in favor of Frame against Early in the amount of \$3,000, and against Tharp in the amount of \$6,000.

Frame now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Frame contends that the trial court erred when it denied his Motion for Summary Judgment, his Motion to Dismiss, and ultimately permitted the jury to apportion liability to Michael Kaye Industries as a nonparty.^{2 3} Specifically, he argues that Tharp and Early did not assert their intention to allege Michael Kaye Industries was liable as a nonparty defendant until it was too late.

From our review of the record, we conclude that Frame's own contradictory actions and assertions have made our analysis seem more complex than it actually should be. Frame asserts that when the parties learned of Michael Kaye Industries' role in setting the home, he amended his Complaint to purportedly add Michael Kaye Industries as a defendant on August

² We encourage Frame's counsel to review Ind. Appellate Rule 46. First, his summary of argument section is located after his argument section, although App. R. 46(A) requires that the summary of argument be placed before the argument section (oddly, Frame identifies his summary of argument section as "IV" in his table of contents, and his argument section as "V" but he then arranges his brief so the argument comes first). Additionally, it would have been helpful for Frame to have labeled his summary of the argument section with something more than just "IV" when it followed other subject headings that did not incorporate roman numerals, but rather were labeled, e.g.—"Argument."

³ Frame's Appellant's Brief concludes by stating, "[t]he trial court erred in denying Frame's Motion for Summary Judgment and Motion to Dismiss such non-party defense resulting in a jury verdict assessing forty (40%) percent fault to Michael Kaye on the non-party defense." However, Frame does not mention his Motion for Summary Judgment, Motion to Dismiss, or Motion to Strike (we assume Frame has meant refer to his Motion to Strike because it was in that document Frame attacked Tharp and Early's ability to assert a nonparty defense) anywhere in the Argument section of his Brief.

18, 2000. He now asserts in his Appellant's Brief that Tharp and Early's Answer to that Amended Complaint "for the first time [named] Michael Kaye [Industries] as a non-party defendant." (Appellant's Br. p. 2). However, Tharp and Early alleged in their Answer, filed on August 6, 2004, that Michael Kaye Industries was liable as a defendant, not as a nonparty, as they were responding to Frame's assertion that Michael Kaye Industries was a defendant. Frame relies on the delay in Tharp and Early's Answer to his Amended Complaint to develop his argument that they were dilatory in asserting a nonparty defense. Further, on August 10, 2006, Frame filed a Motion for Summary Judgment, asserting that he was entitled to judgment on Tharp and Early's nonparty defense as to Michael Kaye Industries. In that motion, Frame asserted that "[t]he claims against Michael Kaye Industries[] were later dismissed as obviously being filed too late under the statute of limitations." (Appellant's App. p. 175). However, we find no record of any such ruling by the trial court dismissing Michael Kaye Industries as a defendant prior to Frame's Motion for Summary Judgment. To the contrary, we note that after his Motion for Summary Judgment, Frame filed a Motion to Dismiss on December 6, 2006, seeking to dismiss his own claims against Michael Kaye Industries. (Appellant's App. p. 274).

Indiana Code section 34-51-2-16 provides:

A nonparty defense that is known by the defendant when the defendant files the defendant's first answer shall be pleaded as a part of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time

limitations or make other suitable time limitations in any manner that is consistent with:

(1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and

(2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim.

Since Frame had purported to add Michael Kaye Industries as a party when the parties learned of its role in setting Tharp and Early's home, Tharp and Early did not discover the existence of a nonparty defense at that time. They would have first gained actual knowledge of such a nonparty defense at the time when Michael Kaye Industries was dismissed as a party. *See Owens-Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 915 (Ind. 2001) ("Because the former party defendants that Owens Corning sought to add as nonparties could only have been added as nonparties after they were dismissed as parties, we hold that for purposes of [I.C. § 34-51-2-16], Owens Corning acquired actual knowledge of a nonparty affirmative defense relating to a particular entity only when it received notice that the entity had been dismissed from the action."). Prior to the trial court's ruling on Frame's Motion to Dismiss, Tharp and Early objected to the dismissal of Michael Kaye Industries and alternatively argued that if Michael Kaye Industries was dismissed they should be permitted to advance a nonparty defense alleging Michael Kaye Industries was responsible for all or some of Frame's injuries. Therefore, we conclude that Tharp and advanced their nonparty defense based on the actions of Michael Kaye Industries at their earliest opportunity. Given the discretion afforded trial courts to alter the time limitations for defendants to advance a nonparty defense provided by Indiana Code section 34-51-2-16, we cannot say that the trial

court erred when it permitted Tharp and Early to argue that Michael Kaye Industries was liable for all or some of Frame's injuries to the jury.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not err when it permitted the jury to consider Michael Kaye Industries' liability as a nonparty for comparative fault purposes.

Affirmed.

BAKER, C.J., and ROBB, J., concur.